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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MILLER, Defendant and Appellant.	B282284 (Los Angeles County Super. Ct. No. MA066786)

APPEAL from an order of the Superior Court of Los Angeles, Shannon Knight, Judge. Affirmed in part, reversed in part, vacated in part, and remanded.

Edward J. Horowitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Raymond Miller struck David Simington with a wooden pole during an argument. Subsequently, defendant, who was accompanied by another man, threatened to take Simington to the desert to kill him to prevent him from testifying at an anticipated trial of the criminal charges against defendant arising from the earlier assault. At the later encounter, Simington was separated from his car keys when defendant tripped and tackled him in the alley behind his apartment building. Simington involved one of his roommates, Marc Lawson, in the encounter, and Lawson persuaded defendant and the other man to return Simington's keys.

Based on these two events, the People charged defendant with several crimes including robbery, kidnapping, and criminal threats. The jury found defendant guilty of theft, among other crimes. The trial court sentenced defendant to a prison term that included three one-year prison enhancements.

Defendant challenges his conviction on two grounds. First, he argues that the trial court erred in overruling his hearsay objections to the reading back of Lawson's preliminary hearing testimony, which repeated statements made by Simington concerning defendant's threats.

The parties do not dispute that Lawson's preliminary hearing testimony itself was admissible as former testimony of an unavailable witness because Lawson died before trial. We conclude Simington's statements that Lawson repeated were admissible under the state of mind exception: Simington's mental state was at issue because the robbery, kidnapping, and criminal threats counts required a showing of the victim's fear.

Second, defendant contends that the theft conviction was not supported by substantial evidence. We conclude that the

prosecution introduced sufficient evidence from which the jury could have drawn a reasonable inference that defendant intended to deprive Simington of his car keys.

The parties agree that insufficient evidence supported the three one-year prior prison enhancements because the record adduced below is not clear regarding whether those enhancements "washed out." Accordingly, we reverse those enhancements, vacate the sentence, and remand for resentencing. We affirm the judgment in all other respects.

FACTUAL BACKGROUND

A. August 21, 2015: Defendant Attacked Simington With A Wooden Pole, Causing A Head Injury And Broken Arm

Defendant and Simington first met in prison. Thereafter, on August 21, 2015, Simington was fixing his car at the lot where John Schumann kept his motor home. Simington served as Schumann's "kind of" caretaker, because Schumann had a heart condition.

At some point while Simington was fixing his car, defendant, accompanied by an unidentified man, arrived at the lot and got into an argument with Simington possibly over drugs. Schumann heard the commotion from inside his motor home, went outside, and hollered that defendant was not supposed to be on the lot. Defendant struck Simington with a four-foot wooden pole on the back of his head and right arm. Simington saw defendant strike his arm but not the back of his head. The blows caused Simington's head to bleed and broke his right arm. Simington then attempted to move behind Schumann, at which

point defendant struck Schumann's stomach with the pole and fled.

The paramedics and police arrived. Simington told Officer James Clark about the argument and attack. Simington received treatment for his injuries at a hospital.

Defendant was arrested and charged with assault and battery.

After being released from the hospital, Simington testified about the aforementioned events at the preliminary hearing on the assault and battery charges. We observe that at the preliminary hearing, Simington testified he did not see who hit his arm, but at trial, he testified he saw defendant hit his arm with a wooden pole.[1]

About two weeks after the attack and sometime after the preliminary hearing, defendant's girlfriend, Toni, approached Simington at the gas station where he was working. She asked him out for a drink and how he was feeling. Simington put her off and said he would call her later, although he never did. About a week later, Toni approached Simington at work again and asked him if he planned to testify against defendant; Simington said no. Simington thought "something was up" and observed Toni "had a certain look on her face." Simington had no further contact with Toni.

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[1] At trial, on redirect examination, Simington testified he was mistaken when he testified at the preliminary hearing that he did not see who hit his arm.

B. November 1, 2015: Defendant Threatened To Take Simington To The Desert To Kill Him And Schumann, But Lawson Intervened And Helped Simington Regain Possession Of His Car Keys

In the early morning of November 1, 2015, at about 2:00 a.m., Simington arrived home from work to his apartment building and parked his car in the back alley carport. Someone came to Simington's passenger-side window, looked into the car, and walked off. Upon exiting his car, Simington saw defendant and another man, different from the one who had peered into his car, moving quickly toward him. Simington ran. Defendant kicked Simington's legs and tackled him, causing them both to fall to the ground. Simington believed he lost his car keys when he fell and that defendant or the other man picked them up.

Defendant then picked up a 15-inch knife that had fallen on the ground. Defendant and the other man grabbed Simington. Simington attempted to run away, but could not escape defendant's and now the other man's grasp. Defendant told Simington he was going to kill him, raised the knife, and pointed the blade toward Simington while the other man continued to hold Simington. For Simington, "[f]ear took over." The other man grabbed defendant's arm and said, "not here."

Simington attempted to flee again, and the other man said, "He's not going to go quietly. We've got to do something to him," and "[l]et's just knock him out and take him." Defendant said no, became angry, walked away, and got on his phone. Defendant and the other man then walked Simington southward down the alley while holding on to him. Defendant told the other man to get the truck. The other man walked down the alley southward, in the direction of where the truck would eventually arrive.

Defendant told Simington, "you messed up" and "[y]ou never should have testified against me." Defendant also told Simington that (1) he was going to take him to the desert; (2) they were going to talk Schumann into the car and take him to the desert too; (3) Simington was going to dig a hole in which to bury Schumann; and (4) Simington would be "going in right behind" Schumann.

Simington convinced defendant to allow him to go to his apartment ostensibly to say goodbye to his son. Actually, although Simington had two sons, they were not then at his apartment, and he created this ploy to attempt to seek refuge in his apartment where his two roommates, Lawson and Eddie Peterson, would be. Eventually, defendant and Simington went to Simington's apartment as defendant continued to hold Simington "under the arm with his hand." Simington believed defendant still had the knife. Simington knocked on the apartment door and Lawson opened it.

Simington told Lawson to "wake up" and, referring to himself, also told Lawson he was in "bad trouble," "you gotta help me," defendant and the other man were going to take him to the desert to kill him, and he had lost his car keys. Lawson intervened, causing defendant to release Simington from his grip.

Lawson asked defendant where Simington's car keys were. Defendant whistled, and the other man arrived and pulled a set of keys from his pocket. The keys did not belong to Simington. Lawson grabbed the other man and told him to "[g]o get [Simington's car] keys."

Lawson then went to the alley with defendant and the other man to retrieve Simington's keys. Simington stayed in the

apartment. After returning Simington's keys, defendant and the other man left the scene.

About five or 10 minutes later, Simington went to the carport to inspect his car and found it had been ransacked. Simington also noticed a pickup truck idling at, and then departing from the alley's southern end—the same end toward which the other man had forcibly walked Simington after he and defendant had initially apprehended Simington in the alley.

The police arrived, and Simington gave a statement to Deputy Benjamin Casebolt. Defendant was arrested.

PROCEDURAL BACKGROUND

Based on the August 21, 2015 attack, the People ultimately charged defendant with two counts of assault with a deadly weapon, one count concerning Simington (count 1) and the other, Schumann (count 14). (Pen. Code, § 245, subd. (a)(1).)

Based on the November 1, 2015 events, the People charged defendant with attempted murder of Simington (count 3) (Pen. Code, §§ 664, 187, subd. (a)); assault with a deadly weapon (count 4) (*id.*, § 245, subd. (a)(1)); dissuading Simington as a witness from testifying by force or threat (count 5) (*id.*, § 136.1, subd. (c)(1)); making criminal threats against Simington (count 6) (*id.*, § 422, subd. (a)); kidnapping Simington (count 7) (*id.*, § 207, subd. (a)); two counts of conspiracy to commit murder (counts 8 and 9) (*id.*, §§ 182, subd. (a)(1), 187, subd. (a)); conspiracy to kidnap Simington (count 10) (*id.*, §§ 182, subd. (a)(1), 207, subd. (a)); second degree robbery of Simington's personal property

(count 11) (*id.*, § 211); and first degree burglary (count 13) (*id.*, § 459).[2]

The People initially brought two cases against defendant, one based on the August 21, 2015 events and the other, the November 1, 2015 events. The trial court subsequently granted the People's motion to consolidate the two cases.

At the preliminary hearing on the charges based on the November 1, 2015 events, Lawson testified Simington said that he was in trouble and needed help because defendant and the other man were going to take him to the desert to kill him. Lawson also testified that he aided Simington in repossessing his car keys from defendant and the other man.

Between the time of that preliminary hearing and trial, Lawson died. Thus, the parties stipulated that Lawson was unavailable under Evidence Code section 240, subdivision (a)(3).

At trial, the prosecution called Simington as a witness, where he recounted the aforementioned facts. Defense counsel sought to impeach Simington's credibility with Simington's prior burglary and theft convictions, and preliminary hearing testimony that Simington did not see who struck his arm. Defendant also tried to discredit Simington with his failure to tell Deputy Casebolt that defendant had threatened to take him to the desert. Defense counsel also tried to elicit testimony from Simington to the effect that he did not see the person who struck his head.

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[2] The People charged defendant with two other crimes that they ultimately did not bring to trial: battery with serious bodily injury (Pen. Code, § 243, subd. (d) (count 2) and conspiracy to dissuade a witness from testifying by force or threat (*id.*, §§ 136, subd. (c)(1), 182, subd. (a)(1)) (count 12).

The prosecution then read back Lawson's preliminary hearing testimony as prior testimony of an unavailable witness (Evid. Code, § 1291) in which Lawson repeated Simington's statements regarding the November 1, 2015 events.

Defendant objected to the reading back of Lawson's testimony on several grounds; the only ones relevant on appeal are defendant's hearsay objections. The trial court overruled defendant's hearsay objections on the merits, reasoning that the statements "were offered for a non hearsay purpose, not offered to prove the truth of the matter asserted. For instance, they were questions or requests or directives. Those are not hearsay. Or if they were offered for the truth of the matter, they fell under an exception to the hearsay rule. For the most part they were either excited utterances of Mr. Simington or they were statements of the . . . defendant."

Schumann, Peterson, and several police officers also testified.

Defendant reasserted his hearsay objection when the jury, then deliberating, requested Lawson's testimony be read back.

The jury found defendant guilty of three counts of assault with a deadly weapon (counts 1, 4, and 14), dissuading a witness from testifying (count 5), criminal threats (count 6), attempted kidnapping (count 7),[3] conspiracy to kidnap (count 10), petty theft (count 11),[4] and burglary (count 13). The jury found defendant not guilty of conspiracy to commit murder (counts 8 and 9). The trial court declared a mistrial on the attempted

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[3] The jury found defendant not guilty of the greater crime of actual kidnapping.

[4] The jury found defendant not guilty of the greater crime of second degree robbery.

murder charge (count 3) because the jury could not reach a unanimous verdict on that charge.

The trial court sentenced defendant to serve an aggregate 20-year prison term, including three 1-year prior prison enhancements, and to pay certain monetary fines. Defendant timely appealed.

DISCUSSION

A. The Trial Court Did Not Err In Overruling Defendant's Hearsay Objections To Lawson's Preliminary Hearing Testimony That Repeated Simington's Statements: The Testimony Was Admissible Under The Former Testimony Of An Unavailable Witness And State Of Mind Exceptions Because Lawson Died Before Trial And Simington's Mental State Was At Issue

Defendant argues the trial court erred in overruling his attorney's hearsay objections to certain portions of Lawson's preliminary hearing testimony. Defendant characterizes Lawson's preliminary hearing testimony as repeating out-of-court statements made by Simington that themselves repeated defendant's out-of-court statements. More specifically, defendant argues that the trial court erred insofar as the People used Lawson's testimony to establish defendant's state of mind in support of four of the charges. Dissuading a witness (count 5) required a showing of defendant's specific intent to dissuade a witness from testifying against him. (*People v. Pettie* (2017) 16 Cal.App.5th 23, 68.) Criminal threats (count 6) required the People to prove that defendant intended his statement to be taken as a threat. (Pen. Code, § 422, subd. (a).) For conspiracy to

kidnap Simington (count 10), defendant must have intended to (1) kidnap Simington and (2) agree with another person to kidnap Simington. (*People v. Vega–Robles* (2017) 9 Cal.App.5th 382, 419.) To establish burglary (count 13), the People had to show that defendant intended to commit larceny. (Pen. Code, § 459.)

In response, the Attorney General argues that Lawson's testimony was admissible under the former testimony and state of mind exceptions to the general rule that out-of-court statements are inadmissible for the truth of the matter stated.[5]

"[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Evidence of an out-of-court statement that is offered to prove the truth of the matter stated is inadmissible unless it comes within an established exception. (Evid. Code, § 1200.) Two exceptions to this rule are relevant to this appeal. One arises where an unavailable witness's former testimony, which is itself hearsay, is offered against a party in an earlier proceeding. (*Id.*, § 1291.) The other arises where the hearsay statement is offered to prove the declarant's then state of mind or emotion, which is at issue. (*Id.*, § 1250, subd. (a)(1).)

Here, defendant identifies the following five out-of-court statements as inadmissible hearsay.[6] Each statement presents

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[5] Given our ruling, we do not address the Attorney General's contention that the statements were also admissible as prior consistent statements. (Evid. Code, §§ 791, 1236.)

[6] Defendant refers to "several pages of questions and answers about statements by Simington, Peterson, [defendant,] and another man, who had entered the apartment and who was

hearsay within hearsay, because in each statement, Lawson recites statements Simington made.[7] We address the two levels of hearsay each in turn.

(1) "I'm in bad trouble. Okay. You gotta help me. You gotta help me."

(2) "Q. What else did [Simington] say? [¶] A. That this gentlemen here [defendant] and someone else was going to take him out. They were trying to take him out to the desert."

(3) "[T]hey want to take me out in the desert . . . and I don't want to go."

(4) "Q. What did [Simington] say? [¶] A. He said they want to take me out to the desert and kill me."

(5) "[Simington] said that they even got my car keys. Chased me down in the alley with a knife."

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not identified by name, that referred to 'him,' 'his,' 'they,' etc. . . . and . . . containing hearsay about [defendant]'s intent to take Schumann and Simington to the desert and kill Schumann and possibly Simington, too" and cites "2 RT 18–23." Defendant's vague description of the purported statements does not allow us to identify any particular testimony that might be in the record. Also, defendant's record citation omits page or line numbers. Defendant has thus forfeited his claim of error with respect to these vaguely referenced statements. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656 (*Keyes*) [appellant has burden to prove trial court erred with legal authority and factual analysis supported by appropriate record citations].)

[7] Defendant characterizes these statements as containing three levels of hearsay: Lawson's preliminary hearing testimony, Simington's statements that Lawson repeated, and statements by defendant. We perceive no statements by defendant repeated in the above-quoted statements. Accordingly, we analyze the statements as containing only two levels of hearsay.

The initial level of hearsay is Lawson's preliminary hearing testimony. As previously noted, the parties do not dispute that this level of hearsay is admissible as former testimony under Evidence Code section 1291.[8] Lawson had died after the preliminary hearing and was therefore unavailable for trial, and the testimony was proffered against defendant, who was represented in that proceeding. (See *People v. Gonzales* (2005) 131 Cal.App.4th 767 [preliminary hearing transcript admissible under Evidence Code section 1291].)

The second level of hearsay includes Simington's statements that Lawson repeated. We conclude that these statements were admissible under the state of mind exception to the hearsay rule because Simington's expressions of fear tended to prove an element of at least three of the crimes asserted against defendant.

Evidence Code section 1250, subdivision (a)(1) excepts from the hearsay rule "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health" where such evidence is offered to prove same "when it is itself an issue in the action."[9]

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[8] Evidence Code section 1291 provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and . . . [¶] [t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).)

[9] Evidence Code section 1250, subdivision (a) is subject to Evidence Code section 1252, which renders a statement

Here, the People charged defendant with at least three crimes where the victim's fear was an element: robbery (Pen. Code, § 211 [taking of personal property "accomplished by means of force or fear"]), kidnapping (Pen. Code, § 207, subd. (a) [stealing, taking, holding, detaining, or arresting person by force or "any other means of instilling fear"]), and criminal threats (Pen. Code, § 422, subd. (a) [defendant makes threats "and thereby causes that person reasonably to be in sustained fear for his or her own safety"]).

The five statements at issue expressed Simington's fear: Simington perceived himself as being in trouble, needing help, and imminently being taken to the desert against his will and killed there by defendant. Thus, the statements tended to prove Simington then felt fear, which was an element of at least three of the crimes charged against defendant. The trial court did not err in admitting the statements under Evidence Code section 1250, subdivision (a).

Defendant asserts that the state of mind exception is inapplicable because "Simington's then-existing state of mind, *e.g.*, fear, was not 'itself an issue in the action,' as required by subsection (a)(1) of [Evidence Code] section 1250." Defendant further asserts, "Instead, the issue was [defendant]'s state of mind during the November events." Defendant cites an

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inadmissible "if the statement was made under circumstances such as to indicate its lack of trustworthiness." Defendant recites this requirement, but does not argue that any such circumstances were present regarding evidence he challenges on appeal. Accordingly, defendant has forfeited this contention. (*Keyes*, *supra*, 189 Cal.App.4th at pp. 655-656 [issues unsupported by factual or legal analysis are forfeited].)

Assembly Committee comment on Evidence Code section 1250 stating that, under subdivision (b), hearsay statements narrating threats made by another person are admissible as evidence of fear but are inadmissible as a basis for inferring that the defendant actually made the threats. (Assem. Com. on Judiciary Comment on Evid. Code, § 1250; see, e.g., *People v. Atchley* (1959) 53 Cal.2d 160, 172 [letter introduced by defendant claiming self-defense, written by decedent stating defendant threatened her and she feared him, admissible to show decedent's state of mind of fear, not that defendant threatened her, where defendant asserted decedent was the aggressor in a struggle for a gun].) As discussed above, however, Simington's state of mind of fear was at issue.

Defendant faults the trial court for "not stat[ing] any limitation such as that the admissible hearsay could not be used to establish [defendant]'s actual state of mind." Defendant raises this claim of error for the first time in reply and has therefore forfeited it. (*Hurley v. Department of Parks & Recreation* (2018) 20 Cal.App.5th 634, 648, fn. 10 [" ' "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant" ' "].)

He also failed to request a limiting instruction in the trial court. (Evid. Code, § 355 [trial court required to give limiting instruction "upon request"]; *People v. Riccardi* (2012) 54 Cal.4th 758, 824–825, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192 [trial court under no sua sponte duty to provide limiting instruction]; *People v. Sánchez* (2016) 63 Cal.4th 411, 460 [argument that trial court provided insufficiently detailed limiting instruction uncognizable on appeal because defendant did not request limiting instruction with such details].)

Indeed, when the jury requested Lawson's testimony be read back during its deliberations, defendant's counsel stated to the trial court, "If [the jurors] want the entire testimony, then I guess that's what should be given to them." Significantly, defendant did not even then request a limiting instruction.

Because the trial court did not err in admitting the statements, we do not address defendant's contention that the statements' admission was prejudicial.

B. Substantial Evidence Supported The Theft Verdict

Defendant argues the evidence supporting the jury's guilty verdict on the petty theft charge (count 11) was insufficient because there was no evidence that defendant intended to steal Simington's car keys, defendant knew or reasonably expected that the other man who accompanied him would steal the keys, or anyone took the keys from Simington.

"The law governing sufficiency-of-the-evidence challenges is well established and applies . . . to convictions . . . . [Citations.] In reviewing a claim for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the

circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639 (*Jennings*).)

The elements of theft are: The defendant (1) took possession of property owned by someone else; (2) took the property without the owner's consent; (3) when taking the property, intended to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period that the owner would be deprived of a major portion of the value or enjoyment of the property; and (4) moved the property, even a small distance, and kept it for any period of time, however brief. (CALCRIM No. 1800.)

Lawson testified at the preliminary hearing about the events surrounding Simington's car keys, which testimony was read back at trial, as follows. When Simington first arrived at the apartment with defendant and saw Lawson, Simington "said that they even got my car keys." At some point after Simington went into the apartment, he and Simington were asking defendant about the whereabouts of Simington's car keys. Defendant then whistled, the other man came, and defendant asked the other man for Simington's keys. The other man produced keys but not Simington's. Lawson, defendant, and the other man went outside to the carport area in the alley behind Simington's apartment building, where the other man went into one of the carport stalls and returned about a minute later with Simington's keys.

At trial, Simington testified about the events concerning the keys as follows. Simington arrived home from work in his

car, which he parked in the alley behind his apartment building. After defendant initially tackled Simington in the alley, brandished a knife, and with the other man, grabbed Simington and walked him down the alley, Simington could not find his keys. Simington then persuaded defendant to let him go to his apartment, and Lawson appeared. When the other man came to the apartment, Lawson grabbed him and said "come here" and "[g]o get his keys." Simington stayed in the apartment while Lawson, defendant, and the other man retrieved his keys from the carport.

Lawson's and Simington's chronological accounts of the events support a reasonable inference that Simington dropped his keys when defendant initially chased him down the alley, and that defendant himself or through the other man then took physical possession of Simington's keys from the alley floor. Defendant and Simington's earlier physical altercation, the threats to kill Simington that defendant made in the alley, defendant's attempt to give Simington the wrong keys at Simington's apartment, and the presence of the knife all support an inference that Simington never consented to defendant's taking his keys.

That evidence also supports a reasonable inference that defendant intended to deprive Simington of his keys permanently or for an extended period so as to deprive Simington of a major portion of the value or enjoyment of his keys. This inference is especially true because by taking the keys, defendant impeded Simington's ability to escape. Finally, the facts that (1) the other man retrieved Simington's keys from a place different from where Simington dropped them, and (2) Simington's car was ransacked between the time he "lost" his keys and defendant and the other

man returned them at Lawson's insistence support a reasonable inference that defendant moved the keys and maintained possession of them for some time. Therefore, the evidence adduced at trial was sufficient to support each element of theft.

Defendant also argues that the evidence of his intent to deprive Simington of his car keys was insufficient because (1) Simington testified that he told Lawson he had "lost" his keys, negating an inference that defendant wanted to take Simington's keys, (2) the other man shortly thereafter returned the keys to Simington, and (3) defendant and the other man had their own cars and were without a third accomplice who could have simultaneously operated Simington's car. By these contentions, defendant asks us to draw inferences contradicting those the jury drew. The substantial evidence standard of review does not permit us to do so. (*Jennings*, *supra*, 50 Cal.4th at pp. 638–639.)

C. There Was Insufficient Evidence For The Three Prior Prison Enhancements Thus Requiring Reversing Those Enhancements, Vacating The Sentence, And Remanding For Resentencing

After discharging the jury, the trial court permitted the prosecutor to amend the information to add two prior convictions for violating Vehicle Code section 10851, which criminalizes unlawfully taking a vehicle. Defendant's trial counsel objected to the amendment but identified no basis for the objection. The trial court permitted the amendment and then found that defendant suffered six prior convictions within the meaning of section 667.5, subdivision (b).

Penal Code section 667.5, subdivision (b) "imposes a one-year enhancement for a prior, separate prison term served on a felony conviction. 'Imposition of a sentence enhancement under

[Penal Code] section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.' " (*People v. Kelly* (2018) 28 Cal.App.5th 886, 896 (*Kelly*).) "[T]he enhancement is not imposed if the defendant is free of both felony convictions and incarceration in prison for five years following release from the previous incarceration." (*Ibid.*, italics omitted.)

On appeal, defendant argues the court erred in its Penal Code section 667.5 findings because (1) his penultimate felony conviction was not supported by substantial evidence, and (2) he did not waive jury trial on prior conviction allegations added after the jury was discharged. The penultimate conviction, incurred in 2006, is critical because defendant's later burglary conviction was reduced to a misdemeanor. The trial court correctly concluded it could not consider the misdemeanor burglary conviction for purposes of the Penal Code section 667.5 enhancement. (See *Kelly*, *supra*, 28 Cal.App.5th at pp. 892–893.)

It is undisputed that although defendant was convicted of unlawfully taking a vehicle in 2006, his parole for that conviction was revoked in April 2010 and he was sentenced to an eight-month term. It also is undisputed that the relevant question is whether he remained in custody on August 21, 2010 or later based on the parole revocation.

1. The parties agree that there was insufficient evidence to support the conclusion that defendant did not remain free of prison custody

for a five-year period preceding his current offense

Defendant argues that we must reverse the three one-year Penal Code section 667.5, subdivision (b) enhancements.[10] He contends no substantial evidence supported the finding that he did not remain free of custody for a five-year period preceding his current offense. A trial court cannot impose a Penal Code section 667.5, subdivision (b) enhancement " 'if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole.' " (*People v. Buycks* (2018) 5 Cal.5th 857, 889.) As noted above, the critical question is whether defendant was incarcerated for the parole violation on August 21, 2010 or later.

The parties agree that the evidence fails to elucidate whether, at the relevant time, defendant was incarcerated based on his parole revocation or based on his burglary conviction. Only the former would support the prior prison term enhancement. (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115–1116; *People v. Warren* (2018) 24 Cal.App.5th 899, 917 (*Warren*).) The burglary does not support the prior prison term enhancements because when the burglary was reduced to misdemeanor, it could no longer serve as a felony conviction. (*Warren*, at p. 917.) We agree with the parties that the record is unclear as to the basis for defendant's incarceration during the relevant time period. It follows that the People failed to demonstrate beyond a reasonable doubt that defendant did not

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[10] In an opinion filed February 1, 2019, this court concluded that substantial evidence supported the enhancements. On our own motion, we granted rehearing and permitted the parties to file supplemental briefs.

remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. (*Kelly*, *supra*, 28 Cal.App.5th at p. 896.)

The remaining question is whether the People may retry the three section 667.5 enhancements. Double jeopardy does not bar a retrial on the three enhancements, a proposition defendant does not contest. (*People v. Monge* (1997) 16 Cal.4th 826, 829; see also *People v. Barragan* (2004) 32 Cal.4th 236, 241 (*Barragan*).) Retrial would be limited to the challenged enhancements. (*Barragan*, at p. 243.)

Defendant asserts that such a retrial would "be a waste of judicial resources." His argument, however, is not persuasive because it is based on mere speculation that the prosecution would not have additional evidence from that adduced at trial. Accordingly, we reverse the three prior prison enhancements, vacate defendant's sentence, and remand for resentencing at which time the prosecution may elect to retry the three prior prison enhancements.

2. Defendant shows no other cognizable error

Defendant correctly points out that the trial court allowed the prosecution to add two Penal Code section 667.5 enhancements after the trial court had discharged the jury. Based on this fact, defendant argues that the trial court erred in holding a court trial on these enhancements because defendant did not waive a jury trial as to them. Defendant's argument would have merit if defense counsel had objected on the ground that defendant was entitled to have the same jury decide guilt as well as the truth of the prior conviction allegations. (*People v. Tindall* (2000) 24 Cal.4th 767, 777–778 (*Tindall*).)

By failing to lodge such an objection, defendant forfeited it. (*Id*. at p. 782.)

Forfeiture flows from the fact that there is no constitutional right to a jury trial on a prior conviction allegation. (*People v. Cross* (2015) 61 Cal.4th 164, 172.) More specifically, the right to a jury trial on Penal Code section 667.5 enhancements as alleged in this case is statutory. (*People v. Vera* (1997) 15 Cal.4th 269, 278 (*Vera*) ["the deprivation of the statutory right to jury trial on the prior prison term allegations does not implicate the state or federal constitutional right to jury trial"].) Defendant, moreover, does not argue that he did not receive a fair court trial. Thus, he did not preserve his challenge to the failure to receive a jury trial on the sentence enhancement allegations in the amended information.[11] (*Vera*, *supra*, 15 Cal.4th at p. 281.)

DISPOSITION

The judgment of conviction is affirmed. The true findings on the three Penal Code section 667.5, subdivision (b) enhancements are reversed. The sentence is vacated. The case is remanded with directions to resentence defendant. The

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[11] Defendant's entire legal argument on this issue is as follows: "Independently, the amendment to add the 2006 prior was untimely because the jury had long-since rendered its verdict and had been discharged. (See [*Tindall*, *supra*,] 24 Cal.4th [at p.] 782 ['Because a jury cannot determine the truth of the prior conviction allegations once it has been discharged [citation], it follows that the information may not be amended to add prior conviction allegations after the jury has been discharged']).)"

trial court shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.